UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES B. MCGILLIVRAY, Appellant, v. FEDERAL EMERGENCY MANAGEMENT AGENCY, Agency.	DOCKET NUMBER DE07529110330 DATE: JUL 26 1993

Eva Comacho Woodard, Esquire, Lakewood, Colorado, for the appellant.

Lafayette N. Johnson, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision, issued September 20, 1991, that sustained his removal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, VACATE the initial decision, and REMAND the case for further proceedings consistent with this Opinion and Order.

BACKGROUND

The agency removed the appellant from the position of Contract Specialist, GS-12, in Region VIII, Denver, Colorado, on May 31, 1991. The agency based the removal on the following charge: "Revocation of Procurement Authority." *See* Agency File, Tabs 9 and 11.

In the March 18, 1991 notice of proposed removal, Simon Cardenas, Chief, Regional Administrative Unit, and the appellant's supervisor, explained the agency's action as follows: The appellant, as the regional contracting officer, was responsible for contracting and procurement. In March 1988, the agency headquarters' Office of Acquisition Management (Office) conducted an on-site procurement review for Region VIII and wrote a report citing deficiencies in these areas. As a result, the Regional Director wrote a memorandum outlining specific measures to implement the Office's recommendations to correct the problems. In March 1990, the Office conducted a second on-site review, which revealed that most of the deficiencies cited in the 1988 report still existed. *See* Agency File, Tab 9.

Mr. Cardenas further stated that because of the appellant's failure to implement the recommendations, the Regional Procurement System did not meet certification standards in accordance with Executive Order 12351, Federal Procurement Reforms. He explained that on June 21, 1990, the Director of the Office, Kenneth Brzonkala, revoked the

appellant's contracting warrant, i.e., his delegation of procurement authority. Mr. Cardenas stated that the appellant's loss of the warrant made it impossible for him to perform his duties as a Contract Specialist. *See* Agency File, Tab 9.

An administrative judge with the Board's Denver Regional Office sustained the appellant's removal. The administrative judge first found that the agency could properly take the action under 5 U.S.C. Chapter 75, rather than 5 U.S.C. Chapter 43; that the agency proved that it used a standard to measure the appellant's performance; and that it made the appellant aware of the standard.

The administrative judge then found that the agency proved the charge by a preponderance of the evidence. Specifically, the administrative judge found that the agency proved the following elements: The appellant's procurement authority was revoked; the revocation was proper; and the revocation precluded him from performing the duties of his position. With regard to the first element, the administrative judge cited the memorandum from Mr. Brzonkala. He acknowledged the appellant's assertion that he reviewed and reconciled some contracts after his procurement authority was revoked. He found, however, that the appellant offered no evidence that he exercised procurement duties after the revocation.

With regard to the second element, the administrative judge, citing the errors noted in the 1988 and 1990 reports,

found that the revocation was based on good cause. The administrative judge rejected the appellant's assertions that the errors resulted from his supervisors' or subordinate's actions, the workload, the lack of assistance or training, or the assignment of other duties. He referred to the appellant's position description as indicating that the appellant managed and administered all contract activity assigned to the Region.

With regard to the third element, the administrative judge found that the appellant could not perform the duties of the Contract Specialist position without procurement authority. He noted that the appellant was the only person in the region who had signatory authority on contracts up to $250,000.

The administrative judge rejected the appellant's affirmative defense of sex discrimination. He found that the appellant's situation was distinguishable from that of female Contract Specialists who had lost their procurement authority but had not been removed because, unlike them, he was not in an office where his work could be supervised or assumed by higher level officials. He further found that the agency had not permanently replaced the appellant with a female, Martha Kientz; rather, it had temporarily filled his position through her detail. He rejected as speculation the appellant's assertion that Ms. Kientz was being groomed for his position.

The administrative judge also rejected the appellant's affirmative defense of reprisal for engaging in equal

employment opportunity activity and for filing an appeal concerning the withholding of his within-grade increase. He found that the appellant failed to show a genuine nexus between either of these activities and his removal. The administrative judge concluded that the appellant's removal promoted the efficiency of the service and was a reasonable penalty.

ANALYSIS

The appellant's assertions concerning his affirmative defenses of sex discrimination and reprisal constitute mere disagreement with the administrative judge's findings and as such do not provide a basis for Board review. *See* Initial Decision (I.D.) at 9-11; *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). We find it necessary to remand this case, however, because the administrative judge did not determine whether the charge against the appellant was covered by a performance standard of the appellant's position. In doing so, we find that the appellant has failed to present a basis for remanding the case to a different administrative judge by showing that the administrative judge engaged in any improper conduct. *See, e.g., Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980).[1]

[1] Because of our disposition of this case, we find it unnecessary to address the appellant's additional arguments that the agency acted unreasonably in using the 1988 and 1990 procurement reviews to evaluate his performance, failed to

We find that the agency did not err in choosing to bring the action under 5 U.S.C. Chapter 75. Contrary to the implication throughout the appellant's petition, it is within an agency's discretion to take a performance-based action under Chapter 75 rather than Chapter 43. *See Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1111 (1986). However, even if an agency chooses to proceed under Chapter 75, it may not circumvent Chapter 43 procedures by charging that an employee should have performed better than his performance standards required. Specifically, if the subject of an agency's charge is covered by a performance standard of the appellant's position, the agency may not impose a different standard in taking a Chapter 75 action. *See, e.g., Bowling v. Department of the Army*, 47 M.S.P.R. 379, 381 (1991).

We find that the charge in this case, revocation of procurement authority, was performance-based, and that the Board has authority to consider the underlying reasons for the revocation. The revocation resulted from performance deficiencies revealed by the Office's review of Region VIII. *See* Agency File, Tabs 8, 9, and 11. Thus, the substance of the charge might be covered by a performance standard of the appellant's position. *See Bowling v. Department of the Army*, 40 M.S.P.R. 348, 352 n.2 (1989). Moreover, the charge did not involve issues of national security, and the same agency that

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prove the charge by preponderant evidence, failed to show nexus, and failed to establish that his removal was reasonable and promoted the efficiency of the service.

revoked the appellant's warrant removed him. *See* Agency File, Tabs 8 and 11. Therefore, this case is different from those in which the Board has found that it lacks authority to review security clearance determinations or military selection processes, or actions of agencies over which it lacks jurisdiction. *See Siegert v. Department of the Army*, 38 M.S.P.R. 684, 686-91 (1988).[2]

Here, the administrative judge simply found that "the appellant was provided with a standard against which his performance could be measured." *See* I.D. at 4 (emphasis added). Specifically, he cited the government-wide procurement regulations as "the prime standard" under which the appellant worked. *See* I.D. at 3-4. In addition, he stated:

> Other factors in his job also informed him of the standard expected. He did have performance standards and an official position description. Perhaps more significantly, he had the results of the 1988 on-site review which specifically outlined the errors that his office had committed.

See I.D. at 4.

In making these findings, the administrative judge implied that the agency was not required to use the standards set forth in the appellant's performance appraisal plan to

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[2] *Cf. Lovato v. Department of the Air Force*, 48 M.S.P.R. 198, 200-01 (1991) (an appellant charged with "failure to carryout[sic] assigned duties in a reasonable period of time, tardiness, and unauthorized absence (AWOL)" was not charged with unacceptable performance, and the evidence did not show that the agency attempted to circumvent requirements set forth in 5 U.S.C. Chapter 43 by bringing the action under 5 U.S.C. Chapter 75).

evaluate his performance. However, the decisions that the administrative judge cited, *Graham v. Department of the Air Force*, 46 M.S.P.R. 227 (1990), and *Wellman v. Department of Commerce*, 10 M.S.P.R. 591 (1982), involved employees who did not have established performance standards under Chapter 43. Thus, the issue of whether the agency was circumventing Chapter 43 requirements was not present in those cases.

Here, it is not clear what the appellant's performance standards were prior to the revocation of his procurement authority. The record contains two sets of standards. See Initial Appeal File (IAF), Tab 19, Exhibits P and Q. In its response to interrogatories, the agency stated that the standards at Exhibit P never served as the appellant's official performance plan and that the standards at Exhibit Q constituted the operative performance plan. See IAF, Tab 9, Exhibit W at 5. However, the performance plan at Exhibit Q covers the period from July 1, 1990, through June 30, 1991, the period after the appellant's procurement authority was revoked. Moreover, the performance plan bears no relation to the duties set forth in the position description for Contract Specialist, and was obviously prepared after the revocation. See IAF, Tab 19, Exhibit R. Thus, it is irrelevant to determining whether the agency's charge was covered by a performance standard in effect at the time the appellant's procurement authority was revoked.

In addition, it is not entirely clear whether the deciding official considered only the revocation of the

appellant's procurement authority in sustaining the charge. Although he testified that his decision was based on the appellant's loss of his contracting warrant, he also testified to the effect that the appellant could not perform as a Contract Specialist because of the deficiencies listed in the Office's report. *See* Testimony of Jerome Oakley (Hearing Tape 2A). Thus, he suggested that he considered the appellant's overall performance, in addition to his loss of procurement authority, in making his decision.

The Board will not sustain a performance-based action taken under Chapter 75 if the agency fails to show that the appellant's performance did not meet an applicable performance standard. *See Bowling*, 47 M.S.P.R. at 382. Accordingly, we find it necessary to remand this case for a new initial decision. On remand, the administrative judge should allow the parties to present additional evidence and testimony concerning the performance standards that were in effect for the appellant prior to the revocation of his procurement authority. The administrative judge should determine whether the agency's charge was governed by a performance standard of the appellant's position, and if so, should evaluate the appellant's performance under that standard before deciding

whether the agency proved the charge by a preponderance of the evidence. *See, e.g., Madison v. Defense Logistics Agency*, 48 M.S.P.R. 234, 238 (1991).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.